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IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 15.06.2007

Coram:

The Honourable Mr.A.P.SHAH, CHIEF JUSTICE
and
The Honourable Mr.Justice P.JYOTHIMANI

O.S.A.Nos. 70 & 93 of 2007
and
Connected miscellaneous petitions

O.S.A.No.70 of 2007

Chennai Container Terminal Pvt. Ltd.,
Royapuram, Chennai - 600 013. … Appellant/2nd Respondent.

Vs.

1. Union of India
   Rep. by Secretary,
   Ministry of Shipping, Road Transport &
   Highways, Transport Bhavan,
   New Delhi.

2. Board of Trustees,
   rep. by its Chairman, Chennai Port Trust,
   No.1. Rajaji Salai,
   Chennai - 600 001.

3. Mr.Justice Padmanabhan
   Presiding Arbitrator,
   New No.4, II Street, Wallace Garden,
   Chennai - 600 006.[since deceased]

4. Mr.Justice K.Sampath,
   Arbitrator,
   No.12, Jagadambal Colony,
   1st Street, Chennai - 600 014.

5. Mr.Justice T.N.C.Rangarajan,
   Arbitrator,
   No.502, Capri Towers,
   Sri Nagar Colony,
   Hyderabad. … Respondents

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O.S.A.No. 93 of 2007

Union of India
Rep. by Secretary,
Ministry of Shipping, Road Transport &
Highways, Transport Bhavan,
New Delhi. …. Appellant/Proposed 2nd petitioner.

Vs.

1. Board of Trustees,
rep. by its Chairman, Chennai Port Trust,
No.1. Rajaji Salai,
Chennai - 600 001.

2. Chennai Container Terminal Pvt. Ltd.,
Royapuram, Chennai - 600 013.

3. Mr.Justice Padmanabhan
Presiding Arbitrator,
New No.4, II Street, Wallace Garden,
Chennai - 600 006.

4. Mr.Justice K.Sampath,
Arbitrator,
No.12, Jagadambal Colony,
1st Street, Chennai - 600 014.

5. Mr.Justice T.N.C.Rangarajan,
Arbitrator,
No.502, Capri Towers,
Sri Nagar Colony,
Hyderabad. … Respondents/Petitioner and
Respondents 1 to 4.

Appeals filed under Clause 15 of the Letters Patent against the order passed in Application No.169 of 2007 in O.P.D.No.34482 of 2006 and Application No.353 of 2007 in O.P.No.535 of 2006 dated 09.03.2007.

For Appellant in O.S.A.No.70/07
& 2nd respondent in O.S.A.No.93/07 ::: Mr.H.Seervai,
Senior Counsel for
Mr.S.Raghunathan

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For Appellant in O.S.A.No. 93/07
& respondents 1 & 2 in
O.S.A.No.70 /07 & :::: Mr.V.T.Gopalan,
1st respondent in O.S.A.No.93/07 Addl.Solicitor General of India
assisted by
Mr.T.Wilson,
Asst.Solicitor General

J U D G M E N T

(The Judgment of the Court was delivered by Hon'ble The Chief Justice)

These appeals arise out of a common order passed by the learned single Judge in Application No. 169 of 2007 in O.P.D.No.34482 of 2006 and Application No.353/07 in O.P.No.535 of 2006. By the impugned order, Application No.169 of 2007 in O.P.D.No.34482 of 2006 filed by Chennai Container Terminal Private Limited (for short 'CCTPL') seeking to recall and set aside the order dated 9.1.2007, as well as Application No.353 of 2007 in O.P.No. 535 of 2006 filed by Union of India (for short 'UOI') to implead itself as the second petitioner in the petition were dismissed by the learned single Judge. Both CCTPL and UOI have appealed against the order.

2. The facts leading to these appeals are that in November 1997, tenders were invited by the Chennai Port Trust ('ChPT for short) to take over, maintain, manage and operate the existing Container Terminal at Chennai Port for a period of 30 years on a revenue sharing basis. The P & O Ports Australia, which was a successful bidder, formed a special purpose vehicle called Chennai Container Terminal Limited, which later became a private limited company i.e., CCTPL. The ChPT entered into an agreement on 09.08.2001 with CCTPL. The agreement provided for land lease charges in accordance with the Scale of Rates (SOR) as notified by the Tariff Authority for Major Ports (TAMP). The Ministry issued certain policy guidelines which were incorporated in the order of the TAMP dated 28.11.2001. ChTP claimed that applying the SOR, as notified by TAMP, a sum of Rs.22,84,14,770/- was payable by CCTPL towards annual escalation at 5% of the lease rent. Subsequently, the demand was raised to Rs.39,38,10,972 including one year's rent as premium and one year's rent as security deposit. However, as CCTPL raised a dispute, the mater was referred to arbitration. The Arbitral Tribunal by its award dated 08.03.2006 rejected the claim of ChPT and allowed the counter claim of the CCTPL to the extent that the ChPT shall adjust the sum of Rs. 33,77,09,219/- along with simple interest at 9% per annum from 28th February 2005 till the date of adjustment against the dues payable by CCTPL.

3. The ChPT challenged the award of the Arbitral Tribunal by a petition on 28.03.2006, which was later on numbered as O.P.No.535 of 2006 under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter for brevity sake referred to as 'the Act'). It appears that this petition was fixed for hearing on 17.10.2006, and thereafter

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adjourned on several occasions on the request of the counsel for ChPT. In the meantime, the UOI filed Appl.No.49 of 2007 on 09.01.2007 seeking leave to file a petition under Section 34 of the Act to set aside the award dated 08.03.2006, and this petition was moved before the learned single Judge on the same day and came to be allowed exparte. The CCTPL filed Application No.169 of 2006 for setting aside the order dated 09.01.2007 contending inter alia that UOI cannot seek to set aside the award as it is not a party to either the arbitration agreement or the proceedings before the arbitral tribunal. Subsequently, UOI filed Application No.353 of 2007 for impleading itself as the second petitioner in O.P.No. 535 of 2006. The learned single Judge by order dated 09.03.2007 dismissed Application No.169 of 2007 as well as Application No.353 of 2007. The findings of the learned single Judge are summed up in paragraph-17, which reads as follows: -

> " …. though Government of India was not a signatory to the arbitration agreement, it was a party non-signatory. Therefore, not only a party to the arbitration agreement but a party non-signatory also can challenge the impugned award passed by the learned arbitrator. Further, the scheme of the Code of Civil Procedure applies to the proceedings under Section 34 of the Arbitration and Conciliation Act, 1996. Therefore, the proposition of law that an aggrieved party can challenge the judgment will have to be applied to the facts and circumstances of this case. The contextual facts and circumstances warrant expansion of the definition found under Section 2(1)(h) of the Arbitration and Conciliation Act, 1996 to include the Government of India who is a party non-signatory for the purpose of challenging the award under Section 34 of the said Act."

4. We have heard Mr.H.Seervai, learned senior counsel appearing for CCTPL, and Mr.V.T.Gopalan, learned Additional Solicitor General appearing for the UOI and ChPT.

5. Having considered the submissions made at the Bar, we are of the view that it is not possible to sustain the order of the learned single Judge. Admittedly, UOI is neither a party to the agreement nor to the arbitration proceedings. The agreement dated 09.08.2001 is between CCTPL and ChPT. Article 1 of the agreement defines the 'Party' to mean either the Licensor or the Licensee as the context may require or admit and "Parties" mean both Licensor and Licensee". Article 15 of the agreement contains an arbitration clause and provides that if any dispute or difference or claims of any kind arises between the Licensor and the Licensee, the same shall be finally settled by binding arbitration under the Arbitration and Conciliation Act, 1996, in the event of failure of an amicable settlement. At this stage, a reference may be made to a few relevant provisions of the Arbitration and Conciliation Act, 1996.

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2. Definitions – (1) In this Part, unless the context otherwise requires,

(a) ……..

(b) 'arbitration agreement' means an agreement referred to in Section 7.

(c) 'arbitral award" includes an interim award.

xx xx xx

(h) 'party' to mean a party to an arbitration agreement.

7(1) - 'arbitration agreement' means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

8 - Power to refer parties to arbitration where there is no arbitration agreement:- .

(1) a judicial authority before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration.

Section 34: - Application for setting aside arbitral Award.

xx xx xx

Section 34(2) – An arbitral award may be set aside by the Court only if --

(a) the party making the application furnishes proof that -

(i) a party was under some incapacity

xx xx xx

A conjoint reading of the aforesaid provisions would imply that the word 'party' wherever it occurs in the Act unless the context otherwise requires would only mean such person who is a party to an arbitration agreement. Section 2(1)(b) of the Act defines arbitration agreement' as an agreement referred to in Section 7. Section 7 defines 'arbitration agreement' as an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. Section 2(1)(h) defines 'party' as a party to an arbitration agreement. Section 8 relates to the power to refer parties to arbitration where there

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is no arbitration agreement. Section 34 refers to application for setting aside the arbitration award at the instance of a party. A plain reading of Section 34 shows that only party to the arbitration agreement and party to the arbitration award can file an application to set aside the arbitration award and that too only on the grounds provided under Section 34(2) of the Act.

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6. In Firm Ashok Traders v. Gurumukh Das Saluja, AIR 2004 SC 1433, a two Judges Bench of the Supreme Court has clearly held that only a party to the agreement can make an application under Section 9 of the Arbitration and Conciliation Act, 1996. The Bench observed: - (AIR p.1437 para-13)

> " A & C Act, 1996 is a long leap in the direction of alternate dispute resolution systems. It is based on UNCITRAL Model. The decided cases under the preceding Act of 1940 have to be applied with caution for determining the issues arising for decision under the new Act. An application under S.9 under the Scheme of A and C Act is not a suit. Undoubtedly, such application results in initiation of civil proceedings but can it be said that a party filing an application under S.9 of the Act is enforcing a right arising from a contract? "Party" is defined in Cl.(h) of sub-section (1) of S.2 of A and C Act to mean ' a party to an arbitration agreement'. So the right conferred by S.9 is on a party to an arbitration agreement. The time or the stage for invoking the jurisdiction of Court under S.9 can be (i) before, or (ii) during arbitral proceedings, or (iii) at any time after the making of the arbitral award but before it is enforced in accordance with S.36. With the pronouncement of this Court in M/s.Sundaram Finance Limited v. M/s.NEPC India Ltd., AIR 1999 SC 565 the doubts stand cleared and set at rest and it is not necessary that arbitral proceedings must be pending or at least a notice invoking arbitration clause must have been issued before an application under S.9 is filed. A little later we will revert again to this topic. For the moment suffice it to say that the right conferred by S.9 cannot be said to be one arising out of a contract. The qualification which the person invoking jurisdiction of the Court under S.9 must possess is of being a 'party' to an arbitration agreement. A person not party to an arbitration agreement cannot enter the Court for protection under S.9. This has relevance only to his locus standi as an applicant. This has nothing to do

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with the relief which is sought for from the Court or the right which is sought to be canvassed in support of the relief. The reliefs which the Court may allow to a party under Cls. (i) and (ii) of S.9 flow from the power vesting in the Court exercisable by reference to 'contemplated', 'pending' or 'completed' arbitral proceedings. The Court is conferred with the same power for making the specified orders as it has for the purpose of and in relation to any proceedings before it though the venue of the proceedings in relation to which the power under S.9 is sought to be exercised is the arbitral Tribunal. Under the Scheme of A and C Act, the arbitration clause is separable from other clauses of the partnership deed. The arbitration clause constitutes an agreement by itself. In short, filing of an application by a party by virtue of its being a party to an arbitration agreement is for securing a relief which the Court has power to grant before during or after arbitral proceedings by virtue of S.9 of the A and C Act. The relief sought for in an application under S.9 of A and C Act is neither in a suit nor a right arising from a contract. The right arising from the partnership deed or conferred by the Partnership Act is being enforced in the arbitral Tribunal; the Court under S.9 is only formulating interim measures so as to protect the right under adjudication before the arbitral Tribunal from being frustrated. Section 69 of the Partnership Act has no bearing on the right of a party to an arbitration clause to file an application under S.9 of A and C Act."

(emphasis supplied)

7. A reference may also be made to a decision rendered by a learned single Judge of the Delhi High Court in Florentine Estates of India Limited and Ors. vs. CREF Finance Limited, 2004 (1) ARBLR 579(Delhi), wherein the learned single Judge has held that the legality and validity of an arbitral award can be challenged only by a party to the agreement which is made clear by the provisions of sub-section (2) of Section 34 of the Act when it states that an arbitral award could be set aside by the court only if the party making the application furnishes proof of the nature as stated in the said provision.

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8. In Vasantha Ramanan v. Official Liquidator and Ors., (2003) 114 CompCas 747 (Mad.), a learned single Judge of this Court has also taken a similar view that only a party to the arbitration agreement and a party to the arbitration award can file an application to set aside the arbitration award and that too only on conditions enumerated under Section 34(2) of the Act.

9. However, in the case on hand the learned single Judge has held that though Section 34 of the Act contemplates challenge of the award made by the party to the arbitration agreement, in view of Section 2(1)(h) of the Act, the import of the word 'party' can be judiciously expanded, if the context so warrants. Hence, the word 'party' may include not only the signatory to the arbitration agreement, but also a party non-signatory to the agreement. According to the learned single Judge, the contextual facts and circumstances warrant expansion of the definition found under Section 2(1)(h) of the Arbitration & Conciliation Act, 1996 to include the Government of India, which is a party non-signatory for the purpose of challenging the award under Section 34 of the Act. We fail to appreciate the stand taken by UOI that it is a non-signatory party to the agreement. Learned ASG was unable to show as to how UOI can be said to be a party to the agreement in the face of express provision contained in the agreement, which defined party to include only "ChPT & CCTPL". The word 'Party' is defined in Section 2(1)(h) of the Act to mean a "party to an arbitration agreement" and therefore, ordinarily, the expression 'Party' as used in Section 34 of the Act must carry the same meaning, namely, a party to the arbitration agreement or award. But, as the opening part of Section 2(1)(h) of the Act shows, the definitional meaning is subject to anything repugnant in the subject or context. We must, therefore, see whether there is anything in Section 34 or in the context in which it occurs which should compel us to place a broader meaning different from the one given to it in Section 2(1)(h). In our opinion, there is nothing in the subject or context of Section 34 which would suggest us to depart from the definitional meaning of the expression 'party'. The expression 'party' is used in Section 34(2) in its definitional sense to mean a party to the arbitration proceedings and does not include a third person, who is not a party to the agreement. To our mind the interpretation suggested by the learned ASG would make the Act totally unworkable. It is well settled that an award is final and binding only on the parties and can be enforced only against the party to the award. A third party would therefore be in a position to challenge the award, but not be bound by it, if the challenge fails. Equally, a third party can render the limitation period envisaged under the Act otiose by merely claiming knowledge of the award long after the period of limitation has expired.

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10. Learned ASG, however, submitted that UOI is an aggrieved party inasmuch as the arbitrator has totally misconstrued the guidelines of UOI and therefore, the UOI can challenge the award of the arbitrator. In support of his submission, learned ASG placed reliance on the Division Bench judgment of the Delhi High Court in Sohan Nayyar v. Lt.Governor, Delhi, AIR 1983 Delhi 301. The said decision is under the old Arbitration Act of 1940 and the Bench clearly found that the provisions of the Act of 1940 do not specify as to whi can make an application, and therefore held that as the Act does not prohibit filing of an objection by a third parties, there is no bar to some one else filing objections provided they have some interest in the subject matter of the litigation. As observed by the Supreme Court in M/s. Sundaram Finance Limited vs. M/s. NEPC Limited, 1999 (2) SCC 499, the Arbitration and Conciliation Act, 1996 is based on UNCITRAL Model. It is entirely different from the Arbitration Act, 1940. The provisions of this Act must, therefore, be interpreted and construed independently and in fact reference to 1940 Act may actually lead to misconstruction. In order to get help in construing these provisions it is more relevant to refer to the UNCITRAL Model Law rather than the 1940 Act.

11. Learned ASG, relying upon the decision of the Supreme Court in ITI Ltd. Vs. Siemens Public Communications Network Ltd., (2002) 5 SCC 510 submitted that the provisions of CPC would apply to the proceedings under Section 34 of the Act and an aggrieved party for the purpose of challenging the award can invoke Section 34 of the Act. The contention is required to be stated only for rejection. In ITI Ltd. Case the Court held that merely because second appeal is barred under sub-Section (3) of Section 37, remedy of revision would not cease to be available. Although revision is not specifically provided for by the Act but in the absence of any express exclusion of CPC, no inference can be drawn that provisions of CPC would not apply to proceedings arising under the Act and revision is not maintainable. This decision has no application to the case on hand. Section 34 of the Act read with the definition of 'party' in Section 2(1)(h) of the Act makes it amply clear that only a party to the arbitration agreement can invoke the provisions of Section 34 of the Act. A third party has no locus standi to challenge the award under Section 34 of the Act.

12. Learned ASG also referred to an unreported decision of the Division Bench of this Court in O.S.Nos.169 to 176 of 1993 dated 01.12.1994 (Madras Refineries Limited v. U.B.Petroproducts Limited & 2 others). This judgment, in our opinion, is wholly irrelevant. It is based on Section 13 of the old Act, which confer powers on the Arbitrator or Umpire to state a special case for the opinion of the Court. However, there is no such provision contained in the new Act and therefore this judgment has no application to the facts of the present case.

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13. In the result, O.S.A.No. 70 of 2007 is allowed. Application No. 169/06 is ordered, and the order dated 09.01.2007 is set aside. O.S.A.No.93 of 2007 is dismissed. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-
Asst. Registrar.

/true copy/

Sub Asst. Registrar.

pv/sm

To
1. The Sub Assistant Registrar,
Original Side,
High Court, Madras.

+ 1 CC To Mr. P.Wilson, Asst. Solicitor General of India, Advocate SR NO. 35420

+ 1 CC To Mr. S.Raghunathan, Advocate SR NO.35159

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